IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-5847

HARRELL ALEXANDER, SR.,
Petitioner,

vs.

GARDNER-DENVER COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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INTEREST OF THE AMICUS CURIAE *

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade associations, with an underlying membership of approximately 5,000,000 business firms and individuals and a direct business membership in excess of 38,000.

* This brief is filed with the written consent of both parties pursuant to Supreme Court Rule 42(2).

The issue in the instant case—accommodation of the national labor policy on arbitration with the statutory right of employees with claims of alleged discrimination in employment—is a matter of significant national concern. Numerous employers throughout the country are engaged in interstate commerce and under the 1972 amendments now come within the provisions of Title VII of the Civil Rights Act of 1964. Further, a substantial number of these employers have collective bargaining agreements containing both no-discrimination clauses as well as grievance and arbitration procedures to resolve disputes involving their employees arising under such agreements.

The Chamber appeared as *amicus* when this question was previously presented to the Court but left unresolved in *Dewey* v. *Reynolds Metals Company*, 402 U.S. 689, 3 FEP cases 508 (1971). At that time the undersigned Counsel urged the Court adopt a form of collateral estoppel as a viable method of accommodation on the issue set out above. The interest of the National Chamber in the outcome of this litigation is vital. It appears before this Court as *amicus curiae* to again urge a realistic approach on the pending cause urging affirmance of the decision below, predicted on the substantial and far-reaching consequences that the result in this case will have not only for American industry, but for the arbitration process, a mainstay of the national labor policy.

I. STATEMENT OF THE CASE

Petitioner is before the Court seeking another opportunity to attempt to establish his alleged claim of racial discrimination, notwithstanding the fact that he has been told there is no basis for such claim by a distinguished labor arbitrator and state and federal civil right agencies.[1]

[1] It should be patently clear that Petitioner is here without a single inferior tribunal, including the EEOC, having found any basis for his allegation of racial discrimination.

The facts underlying Petitioner's claim, as well as a descriptive history of the prior investigation and litigation, are fully set forth in an accurate manner in the brief of Respondent Gardner-Denver Company. The Petitioner in his brief unfortunately has overstated the facts and his appellate counsel has engaged in substantial *post-hoc* rationalizations of Petitioner's subjective motives in the arbitration process.[2] The *amicus* can add little except to emphasize that the central area of inquiry here is the number of opportunities a litigant should be afforded to prove a claim that he alone believes has merit.

II. QUESTIONS PRESENTED

A. Whether an employee who has voluntarily invoked the grievance and arbitration procedures in a collective bargaining agreement with respect to a claim of alleged wrongful discriminatory action and received an adverse arbitration decision is entitled to unilaterally repudiate such award and demand *de novo* consideration of his claim in the federal courts under Title VII of the Civil Rights Act of 1964?

B. What are the appropriate guidelines for the federal trial judiciary to follow in considering whether or not to defer to the decision of an arbitration award adverse to a litigant in an action under Title VII of the Civil Rights Act for employment discrimination?

III. SUMMARY OF ARGUMENT

Faced once again, as in *Dewey* v. *Reynolds Metals Corp.*, supra, with the dual national policies involving (1) the issue of remedies for alleged claims of employment discrimination, and (2) the finality of arbitration awards under collective bargaining agreements, the Court is urged to adopt a modern day form of the rule of col-

[2] *Cf. NLRB* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, 444, 58 LRRM 2721, 2723 (1965).

lateral estoppel sanctioning deference to existing arbitration awards on claims involved in Title VII litigation. Further, through the delineation of guidelines for the lower federal courts to follow in honoring such awards, this court will permit the accommodation of two desirable national policies and substantially reduce the amount of duplicate and wasteful litigation that threatens to engulf an already overburdened trial judiciary.

Recognizing that enhancement of arbitration as a viable instrument for the settlement of industrial disputes can be harmonized with the elimination of discriminatory practices and artificial barriers that impede citizens from achieving equality of employment opportunity, the Court is urged to chart a middle ground and avoid the course urged by Petitioner which would have the ultimate effect of elevating one area of national policy over another.

Specifically the Court is urged to hold that when an employee has received an adverse arbitration award under a collective bargaining agreement on a claim of discrimination, such award should be accorded a degree of finality by directing the trial courts to make specific inquiry as to whether or not it should honor such award and terminating litigation before it under Title VII thus avoiding the need for a lengthy and repetitious consideration of a claim already heard and rejected by a competent tribunal.

Further, the Court is urged to establish the criteria which a Title VII litigant must meet to overcome the arbitration award as a bar and obtain a *de novo* hearon his Title VII claim in the federal District Courts. Such standards, as are suggested *infra*, would furnish appropriate guidelines for the Courts below and place future litigants on notice that they may not with impunity avoid the consequences of arbitration awards duly

rendered under processes invoked by them. Only in such a way can the Court secure the national labor policy while protecting the rights of citizens to seek relief in the Federal Courts, on a non-vexations basis under the Civil Rights Act of 1964.

IV. ARGUMENT

A. THE CIVIL RIGHTS ACT SHOULD NOT BE UNDULY CONSTRUED TO INVEIGH AGAINST THE NATIONAL LABOR POLICY FAVORING VOLUNTARY ARBITRATION OF LABOR DISPUTES: ACCOMMODATION IS IN THE PUBLIC INTEREST.

From the time *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 40 LRRM 2113 (1957) was decided, this Court has followed a virtually unswerving path in making voluntary arbitration one of the mainstays of the nation's labor policy. In the "Steelworkers Trilogy"[3] the Court created the framework for the policy. Later cases added to the substance, particularly by making utilization of the grievance-arbitration provisions a prerequisite to a court suit. *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 58 LRRM 2193 (1965); *Vaca* v. *Sipes*, 386 U.S. 171, 64 LRRM 2369 (1967).

Finally, in *Boys Markets, Inc.* v. *Retail Clerks*, 398 U.S. 235, 74 LRRM 2257 (1970), the Court corrected the only deviation from its otherwise consistent path by holding that Federal courts have power to enjoin strikes in violation of a collective bargaining agreement where the issue in the strike is subject to an arbitration provision.

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[3] *United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *United Steelworkers of America* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

At the same time there is little argument that the 1964 Civil Rights Act is major legislation expressing the public interest in a field of concern to all citizens. Title VII thereof was intended to eliminate discriminatory preferences for any group, majority or minority, and the removal of artificial barriers to employment. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 3 FEP Cases 175 (1971).

The Court in the instant case is faced with having to effect a reconciliation with these twin areas of the national interest which, standing alone, are highly desirable on their own merits. The *amicus*, unlike Petitioner, believes that a harmonious accomodation can be effected and would not give "highest priority" to one area at the expense of the other thus nullifying the impact of a well established national objective that has brought a high degree of stability to the sometimes volatile industrial relations scene.[4]

Whenever faced with a situation of such nature, this Court has customarily chosen the path which reconciles conflict between national objectives and permits its citizens to receive the benefit of each with a minimum of friction. It is urged to do so in the present case.

1. Arbitration awards are binding under the national labor policy upon all participants in such forum.

This Court for sixteen years has taken a consistent position that final and binding arbitration is the preferred method of settling disputes arising out of the employment relationship where there is a collective bargaining history. The key to the acceptance of this policy is, of course, the "final and binding" nature of the arbitration process.

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[4] Petitioner in his brief expresses concern about protection of the public interest but overlooks the fact that industrial peace is likewise a concern of the public interest. (p. 10)

The necessity for mutuality in the arbitration process was further emphasized in *Boys Markets*, supra, pointing out that employers will be wary of assuming obligations to arbitrate binding on them when no similarly efficacious remedy is available to enforce the concomitant undertaking of the other side.

To carve out a wholesale exception to the carefully and consistently developed national labor policy, as Petitioner urges, is patently unfair to the employer. Currently 69% of the collective bargaining agreements in the country contain very explicit "no discrimination" clauses.[5] some of these clauses are remarkably similar to the requirements of Title VII.[6]

However, employers confronted with the result urged by Petitioner (i.e. if the employer loses in arbitration it is final but if he wins the employee starts over in the courts) will quickly realize that this double exposure can be eliminated by excluding claims of discrimination from arbitration. It is submitted that such a result is both undesirable and unnecessary.

Further, it is fast becoming a familiar pattern for an employee or his designated union representative to raise an otherwise cognizable claim of discrimination under Title VII in the forum of arbitration and then, upon receiving only partial relief repudiate the unfavorable portion of the award and seek to litigate that portion of his claim in the District Courts, a scene which has in

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[5] *Basic Patterns in Union Contracts*, 7th Ed. BNA, February 1971.

[6] The clause in the labor agreement covering Petitioner as listed on p. 23 of the Record of Appendix was as follows: "The Company and the Union agree that there shall be no discrimination against any employee on account of race, color, religion, sex, national origin, or ancestry. The Company further states and the Union approves that no such discrimination shall be practiced against any applicant for employment."

recent times been before the Sixth Circuit on two occasions. *Spann* v. *Joanna Western Mills*, 446 F.2d 120, 3 FEP Cases 831 (1971) and *Thomas* v. *Carey Mfg. Co.*, 455 F.2d 911, 4 FEP Cases 468 (1972). In both cases the Court of Appeals, on the basis of its holding in *Dewey*, affirmed by this Court, supra, upheld the granting of summary judgment by the District Court dismissing the action. In *Spann* Judge Peck writing the Court's opinion referred to the employee's attempt to have "four separate bites of the apple" (1) arbitration; (2) the Michigan Civil Rights Commission; (3) the EEOC: and (4) the judiciary, characterizing the Plaintiff's effort, as a "successive monogamy of remedies", supra at 446 F.2d 123, 3 FEP cases 833.

The Court is urged to reinforce the position it has taken since *Enterprise* that has resulted in a strengthening of the arbitration process as the primary means for settling employment disputes arising under collective bargaining agreements and to channel such matters away from the arteries of the federal judicial system.

Those Courts of Appeal that have stopped to consider the problem of accomodation have expressed concern, in varying degrees, as to the sanctioning of an obvious unilateral structure permitting an employee to first invoke arbitration and then reject the results, if unfavorable. This concern was perhaps best expressed by the Trial Court below:

> "The vital importance of the Civil Rights Act must not be overlooked but it is the employee who elected arbitration. His was a voluntary choice and he should be bound by it. The Constitution and Title VII demand equality, neither requires preferential treatment of minorities. Chief Justice Berger's opinion in *Griggs* v. *Duke Power Co.* (1971) 401 U.S. 424, 3 FEP Cases 175, can be read in no other way." —— F.S. —— 4 FEP Cases 1209.

Notwithstanding the treatment of this aspect of the case by the Court below, Petitioner offers no response in his brief. Perhaps the reason is that fundamental elements of fairness as well as the national labor policy dictate that there be mutuality of conclusion upon all parties to an arbitration case. Judge Weick, in his opinion for the Sixth Circuit on rehearing in *Dewey*, stated that there appeared to be no good reason why an award of an arbitrator should not be binding upon both parties, the same as a judgment of a Court, supra. This salient comment as to the effect of a judgment leads to the *amicus'* final comment on this point.

This Court must ponder the effect of its holding if an employer has moved to confirm an arbitration award under the U.S. Arbitration Act.[1] Section 13 of the Act provides that the judgment shall be docketed as if it were rendered by the Court in an action. The Section concludes in these terms:

> "The judgment so entered shall have the same force and effect in all respects as, and be subject to all the provisions of law relating to a judgment in an action; and it may be enforced as if it had been rendered in an action in the Court in which it is entered." 9 USC 13

Under the arbitration statute a party to an arbitration award has one year from the date it is rendered to move to confirm it. Once done, the language of the Act clothes such award with "the same force and effect" as a judgment of the Court. Query the result, in a case where the Trial Court is faced with one judgment based upon an arbitration award which finds no claim for discrimination being in conflict with its own opposite judgment, after a trial on the merits?

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[1] 9 USC 9.

In such a circumstance, which the *amicus* concedes is not present here, how is the trial court to view the conflicting judgments? Can the court, unlike the Petitioner here, ignore either judgment with impunity? The *amicus* urges that it is necessary to the preservation of the structure of the arbitration process, absent specific congressional approval, that an employee not be permitted to unilaterally repudiate an arbitration award rendered in a proceeding which he or his legal representative[8] has voluntarily invoked. The purpose of arbitration would be easily thwarted and the national labor policy seriously threatened if awards were held by the Courts to be binding only on employers but not on employees, and the Court is urged to reject such contention.

2. The most desirable method for dealing with claims of discrimination is arbitration where such claims are cognizable under a labor agreement.

The dynamics of the arbitration process have long since established its high desirability as an instrument of industrial peace, contrary to Petitioner's claim. Since the vast majority of labor agreements provide prohibitions against discrimination substantially similar to those provided by Title VII, arbitration provides a ready-made forum for the handling of these claims with a number of advantages over the courts for each of the participants.

From the employee's point of view, as even Petitioner concedes in his brief (p. 25) faster relief, if relief is warranted, is considerably less expensive, since the union provides representation for him, and at the same time is generally considered fair.

From the union's point of view, arbitration of discrimination claims permits it to represent the employees in all of their dealings with the employer, rather than fragmenting the union's representation status.

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[8] Cf. 29 USC 158, et seq.

From the employer's point of view, arbitration is faster,[9] less expensive, and is a method of dispute resolution which is now considered generally acceptable in the business community.

In addition, arbitrators are better qualified to deal with claims of discrimination arising out of the employment relationship than are the courts. Arbitrators deal with questions of industrial practices including discipline and discharge on a day-to-day basis. Such daily contact equips them to readily distinguish between real and purported reasons for discipline and discharge. They are also familiar with the needs and practices of the employing industry and if necessary can make on site inspections. In *Steelworkers* v. *Warrior and Gulf Nav. Co.*, Mr. Justice Douglas compared the competence of the arbitrator and the courts with regard to industrial disputes:

> "The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed." 363 U.S. at 581-582, 46 LRRM 2419.

The Courts on the other hand are not only ill-suited to deal with these problems, but the tremendous increase in this type of litigation cannot help but exacerbate the growing crisis caused by overburdening case loads.

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[9] This of course can be an extremely critical factor to both the employer and the employee when there is the possibility of back pay with running liability involved.

Petitioner attempts to overcome this natural affinity of the arbitration process for resolving Title VII claims of employment discrimination by attacking it on an institutional basis. Initially, he raises the false specter that labor organizations cannot be trusted to properly represent persons in the bargaining unit because there is a "built in conflict of interest" to any employee claiming discrimination. This generalization overlooks the fact, however, that a labor union has a "duty of fair representation" specifically recognized by this Court, *Vaca* v. *Sipes*, supra, and that the failure to properly represent employees in the grievance and arbitration machinery violates that duty. *Steele* v. *Louisville and Nashville RR*, 323 U.S. 192, 15 LRRM 708 (1944).

Second, Petitioner's claim likens arbitration to a process totally devoid of structure with no safeguards for the rights of participants. Such assertion exhibits not only a lack of familiarity with the institution itself but also with one of the major criticisms leveled at it today. The very charge of lack of safeguards and legal structure raised by Petitioner is refuted by the experts in the field. Robin W. Fleming in an exhaustive analysis of the arbitration process had this comment:

> "The formality criticism is more complicated since it includes a bundle of interchangeable items. The substance of the charge is that the merits of the dispute get lost in arguments over arbitrability, the form of the grievance, technical rules of evidence, the application of precedent, reliance upon transcripts, briefs, etc." [10]

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[10] *The Labor Arbitration Process*, R.W. Fleming, University of Illinois Press (1965) p. 57.

Further, the Court is asked to take judicial notice of the Voluntary Labor Arbitration Rules of the American Arbitration Association which outline a complete procedure framework for an arbitration proceeding.

In summary, Petitioner's institutional attacks on the arbitration process are not borne out by any substantial evidence and are merely the undocumented conclusions of his counsel.[11] One need look no further for final proof of the viability of this process as a sound and effective mechanism for resolving employment discrimination claims arising under the collective bargaining agreements, than the vast body of arbitration awards handed down every year by knowledgeable adjudicators who may indeed be called the unrecognized judges of industrial relations in America.[12]

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[11] For example, his contention that arbitration cannot deal with class problems is inaccurate. In everyday industrial relations parlance they are known as "group grievances."

[12] See e.g. *Tri-City Container Corporation* (Pigors, P. Arb.) 42 LA 1044 (1964) Racial discrimination in administration of job qualification test; *Allen Manufacturing Co.* (Hogan, J. Arb.) 49 LA 199 (1967) Sex discrimination in employer's disqualification of female employees from physically demanding work; *Avco Corporation* (Turkus, B. Arb.) 54 LA 165 (1970) sex discrimination in denial of equal overtime opportunity to females; *Gross Distributing, Inc.* (Allman, W. Arb.) 55 LA 756 (1970) sex discrimination in application of seniority rules; *Community Unit School Dist. 205* (Seitz, P. Arb) 55 LA 895 (1970) sex discrimination in refusal to fill vacancies with qualified female employees; *Memphis Light, Gas and Water Division* (William, R. Arb.) 59 LA 1040 (1972) Racial discrimination in failure to promote qualified black employees to vacant positions; *Albertson's, Inc.* (Eldeman, E. Arb.) 59 LA 1119 (1972) racial discrimination in demoting black employee whose vocational difficulties were attributable to lack of cooperation due to racial prejudice.

B. THE DOCTRINE OF COLLATERAL ESTOPPEL IN THE MODERN FORM OF "POST ARBITRAL AWARD DEFERENCE" IS PROPERLY APPLICABLE TO TITLE VII CLAIMS OF DISCRIMINATION WHICH HAVE PREVIOUSLY BEEN VOLUNTARILY SUBMITTED TO ARBITRATION UNDER A LABOR CONTRACT.

Those who argue that an employee should not be bound by the arbitration award base their argument on two grounds: (1) the employee is asserting two different rights, one contractual and the other statutory; and (2) the arbitrator may not consider the full statutory claim of the employee or may be precluded from doing so by some other section of the agreement.

As has already been shown, the first ground may not exist in a large number of cases where the contractual prohibitions on discrimination are virtually identical to the statutory prohibitions. In these cases there are not two separate rights, but rather one right expressed in two different places.

The second ground may be a valid consideration, but to hold that an arbitration award is not bindng on the employee involved because there is a question as to whether or not he had a fair hearing or his claim received due consideration is to categorically discard a proven and desirable vehicle that offers substantial advantages. Fortunately, such an all or nothing choice as Petitioner repeatedly urges as his primary theme, need not be made. The *amicus*, as in *Dewey*, again submits that the equitable doctrine of collateral estoppel amalgamated to the parameters of the labor arbitration process is peculiarly suited for use by the courts in the situation here.

The general doctrine is not unknown and has been invoked and applied to administrative proceedings under the

Civil Service Act (*Bentley* v. *Teton*, 153 N.W. 2d 495); in the Court of Claims; (*Delatush* v. *United States*, 151 Ct. Cl. 405); and before the Interstate Commerce Commission (*N.Y.S. & W.R. Co.* v. *Central R. Co. of N.J.*, 156 NYS 2d 199).

The *amicus* here urges the application of such doctrine, but under the more modern and recognized label of "post-arbitral award deference"[13] In essence, its position is that while an employee who has invoked the disputes resolution machinery of a labor contract and received an adverse decision cannot be denied his statutory right under Title VII to institute an action in Court, accommodation with the national labor policy requires that he be bound by such decision in the alternative forum under certain circumstances and the District Court should be required to defer, in its deliberations, to the prior decision of the arbitrator on the issues involved in the subsequent litigation.

More traditional considerations beyond the national labor policy dictate such accommodation. Mutuality of obligation and remedy, equitable estoppel, *res judicata*, and fundamental fairness are all doctrines well rooted in Anglo-Saxon jurisprudence. This Court has had occasion in recent years to re-examine the principle of "mutuality of estoppel" in connection with a judgment. In *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, et al., 402 U.S. 327 (1971) a unanimous Court permitted the defendant in a patent infringement suit to raise a plea of estoppel on a judgment rendered against the plaintiff in another action involving a different defendant. Speaking for the Court, Mr. Justice White stated that the trend had been toward sanctioning the lower courts facility "in dealing with questions of when it is appropriate and fair to impose an estoppel against

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[13] *Spielberg Mfg. Co.*, 112 NLRB 1080, 36 LRRM 1152 (1955). Cf. *The Developing Labor Law*, Morris, C.J. Ed. pp. 489 et seq.

a party who has already litigated an issue once and lost." Supra at 402 U.S. 349.

The rule urged on the Court here by the *amicus* adheres to this trend by permitting a defendant employer to assert a prior arbitration award as a defense in a concurrent or subsequent Title VII action and then have the District Court examine it at the motion stage of the litigation, to determine if it constitutes an appropriate adjudication of the issues before the Court and requires dismissal of the action. This doctrine would mean substantial progress in the reduction of multiple litigation between common parties over the same dispute.

Central of course to any such rule is that the criteria which the District Court uses in its examination of the award be consistent with recognition that the Petitioner has, in fact, received a proper adjudication.[14]

It is submitted that such inquiry on deferral to a prior arbitration award would be in conformity with Title VII and enhance its effectiveness without undermining the national labor policy on arbitration.

Petitioner unfortunately throughout his brief consistently rejects efforts at accommodation through post arbitral award deference:

> ". . . there are no circumstances under which pursuit of grievance machinery to arbitration should prevent a federal court from reaching the merits of a charge of employment discrimination." (Petitioner's brief p. 13)

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[14] Of course, the point raised earlier in this brief as to the effect of a motion to confirm the award thus making it a judgment of the Court must also be in harmony with such inquiry by the Trial Court.

His woefully inadequate suggestion that arbitration awards should be accorded only evidentiary weight is entirely consistent with such position and, in reality, is merely the ultimate expression of his rejection of the principle of accommodation urged by the *amicus* here.

Petitioner relies upon the legislative history of the 1972 amendments for support of his position. The *amicus* submits that he has overread such history and that the points he offers can actually be urged to substantiate a contrary conclusion. Thus the fact that Section 702(b) of the Act requires the EEOC to give "substantial weight" to final findings and orders of state and local agencies evidences an intent to treat the decisions of other tribunals with a high degree of respect and not in the inferior manner suggested by Petitioner.

Likewise, the fact that Congress rejected efforts of the House to make the Federal Courts the sole and exclusive forum for resolving claims of employment discrimination can be equally cited as authority for the recognition that a variety of tribunals may be resorted to by claimants leaving the question of accommodation to the normal pattern of judicial doctrine. Thus assuming *arguendo* that there are complementary remedies for Title VII claims, it does not automatically follow, as Petitioner contends, that the Courts are deprived of the power to adhere to the traditional doctrine of collateral estoppel. Nothing contained in the legislative history of the Act supports a conclusion that Congress intended to erode the fundamental powers of the judiciary to harmonize dual and desirable legislative objectives in the national interest.[15]

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[15] The Court has frequently cautioned that "it is best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Girouard* v. *U.S.* 328 U.S. 61, 69 (1969).

C. APPROPRIATE GUIDELINES SHOULD BE FORMULATED BY THIS COURT REFLECTING ACCOMMODATION OF THE TWO NATIONAL OBJECTIVES.

The Court has the further opportunity to implement the accommodation of the national labor policy on arbitration and the elimination of discrimination in employment opportunities by enunciating guidelines for the benefit of the trial judiciary which will enable them to implement the spirit of the court's action in this case. Accordingly, the *amicus* proposes for the court's consideration the following as the parameters within which the above accommodation can, under a rule of reason, go forward.

First is the matter of the burden of raising the prior arbitration award in the Title VII litigation. It would appear best to require the respondent employer to assume this burden of pleading in the District Court after an arbitration award has issued. Such defense would be pleaded under Federal Rule 8(c). Once done, however, the burden should then shift to the Petitioner as the party attacking the award to document why it should not be accorded the degree of finality generally given such decisions by establishing the absence of the factors listed below.[16]

Once the matter is properly before the Court, as outlined above, deference to the arbitration award should be granted if the following circumstances are present:

1. The Petitioner was fairly and adequately represented in the arbitration.

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[16] This places the burden on an equal plane with the U.S. Arbitration Act. However, unlike a motion to vacate, since a different issue is before the trial court, i.e. accommodation of the award with Petitioner's statutory rights to seek relief under Title VII, the trial court properly should have a broader area of inquiry before determining if it will grant post-arbitral award deference.

2. The Arbitration was conducted in a fair and regular manner.

3. The collective bargaining agreement contained a provision prohibiting discrimination consistent with Title VII.

4. The issue of discrimination otherwise cognizable under Title VII was raised in the arbitration.

5. The arbitrator had the authority under the collective bargaining agreement to rule on the Petitioner's claim he now asserts in the court action.

6. The Arbitrator's decision is not clearly repugnant to the purposes of the Act.

The above criteria are substantially in accord with the decision of the Fifth Circuit in *Rios* v. *Reynolds Metal Company* (C.A. 5) 467 F.2d 54, 5 FEP Cases 1 (1972). Unlike *Rios* however the *amicus* here would place the burden for overcoming the effect of the arbitration award on the party who seeks to avoid it. This would be in accord with the national labor policy giving an element of finality to such decisions and be consistent with other permissible efforts along similar lines. *Steelworkers* v. *Enterprise Wheel & Car Corp., supra.* Placing the burden in this fashion would also be in accord with the Court's action in *Vaca* v. *Sipes, supra* where it held that the employee asserting that his union had breached its duty of fair representation must establish the facts supporting a finding by the Trial Court to avoid the doctrine of exhaustion of contractual remedies required under the *Maddox* rule.

The *amicus* submits that the foregoing principles, if adopted by this Court, will furnish the lower courts with the proper dimension of their inquiry in cases of this kind. Petitioner's statutory rights under the Civil Rights

Act are protected because he can avoid the effect of an arbitration award by establishing the existence of circumstances under which the Court should not grant deference. In addition the adoption of the suggested guidelines in this case will serve as a *caveat* to all parties and arbitrators alike as to the independent statutory rights of an aggrieved person under Title VII and its relationship to the arbitration process. Under those circumstances, it is clear that the national labor policy favoring arbitration clearly dictates substantial legal effect be given to the arbitrator's decision and this court is so urged to hold.

D. THE DECISION BELOW SHOULD BE AFFIRMED ON THE RECORD BEFORE THE COURT.

As has been noted earlier, Petitioner appears before this Court in the face of adverse rulings from every inferior tribunal where he has sought relief. In this sense his case stands virtually apart from every other Court case involving the issue of post-arbitral award deference. An examination of these other Court rulings indicates that some affirmative support for the proferred claim of the plaintiff was found in his "successive monogomy of remedies."

This becomes important in the instant case because Petitioner was obviously unable to convince the officials in the Agency most likely to support him, the EEOC, that he had merit to his position.[17] Unlike in the arbitration,

[17] This alone does not operate to bar him from instituting suit under Title VII *McDonnell Douglas Corp.* v. *Green*, —— U.S. ——, 5 FEP Cases 969 (1973).

he asserts no obstacles that prevented him from a presentation of the full scope of his alleged claim of discrimination before the EEOC. Thus it must be concluded that even when he had every opportunity to present his *entire* case, he fell short of establishing, in the words of the statute, "reasonable cause" to believe that the Respondent Company had in fact discriminated against him because of his race when he was terminated. Accordingly, no useful purpose would be served in the present litigation by prolonging this matter. Petitioner has had sufficient opportunities to make out a case and he has failed to do so. The courts are already overcrowded with litigation of a marginal nature and this Court should indicate that a litigant is not entitled to an unlimited number of opportunities to prevail. In this case Petitioner has reached beyond that limit to which he is reasonably entitled.

The resolution of the issues underlying Petitioner Alexander's claim in this case involve matters that call for a working knowledge of labor relations under a collective bargaining agreement by one familiar with such areas who is in a position to assess the validity of his claims. Most seasoned labor arbitrators have the necessary experience and background to make an informed decision on the contentions regarding disparite job treatment raised by Petitioner in the arbitration case such as: (1) Being a drill press "trainee" he was improperly terminated for poor job performance, i.e. making excessive scrap; (2) Only he, among other employees in the plant, was warned at least three times about such conduct and received a temporary suspension for his conduct; (3) He was unfairly discharged when he failed to improve his performance following the prior disciplinary efforts.

Petitioner argues strenuously that only federal district judges are competent to rule on these contentions. The flaw in this argument is that while the conclusionary as-

pect of his claim may fall within the ambit of a legal context, the underlying factors of such determinations are all basically of a labor relations nature and more peculiarly within the competence of labor arbitrators to answer. *Steelworkers* v. *Warrior & Gulf Navigation Co., supra.* These factors involve *inter alia* questions of fact or interpretations of personnel and industrial relations practices. As such, they lend themselves, quite naturally to consideration through the grievance and arbitration provisions of a collective bargaining agreement. An Arbitrator approaching this case would probably ask himself several questions:

1. Did the employee possess the sufficient ability—mechanical, technical, educational, etc.—to properly handle the job?

2. Did the company have a definitive standard of job performance and was it applied uniformally to all employes, including the grievant?

3. Was there some unrepaired mechanical deficiency in the machine which affected the employee's job performance? If so, had be brought it to the attention of the Company?

4. Were there other employees working on the same or similar job and if so, what was the Company's experience with their job performance?

5. What was the reason that the discharged employee was unable to improve his performance in the face of the Company's application of the generally approved method of "progressive discipline" designed to give him notice of the seriousness of his conduct.

6. Did the employee challenge the earlier discipline given him?

It is clear that even a cursory reading of the above questions, reveals how well suited the arbitration process

is to resolving them for essentially industrial relations areas are at the core of Petitioner's claims.

Although he makes several assertions that in effect the Union did not fully and fairly represent him at the aribtration hearing he offers no objective evidence beyond his own subjective belief for such claim. Petitioner "felt" that the Union was not representing his interests in the grievance process, especially as to his "feeling" that he was discharged because of his race. (Petitioner's Brief, p. 42) The record fails to show whether Petitioner sought relief either at the EEOC or the National Labor Relations Board in view of this concern. Nor did the Petitioner join the Union as a party defendant as might be expected where the claimant alleges lack of proper representation by his union in the grievance and arbitration machinery. *Vaca* v. *Sipes*, supra.

Finally, we reach the bedrock of fundamental equity as applied to this particular case. The Petitioner was not forced to submit his grievance under the labor contract.[18] But once having done so and voluntarily invoked the contractual machinery leading to a determination on his claim by Arbitrator Sears, he should be bound by the result and not permitted to unilaterally repudiate the outcome becasue it was unfavorable. Indeed, the arbitration provisions of the collective bargaining agreement expressly mandate such import. Article 23 Sec. 5 Step 5 provides:

> "The decision of the Arbitrator shall be final and binding upon the Company, the Union, *and any employee or employees.*" (emphasis added) (Record Appendix p. 27)

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[18] On the facts of this case, the Court does not reach a question involving the requirements of exhaustion of contractual remedies as a condition precedent to instituting suit under Title VII.

This provision of the labor contract was negotiated by Petitioner's collective bargaining representative. As such he is the beneficiary of that agreement and having voluntarily set the grievance and arbitration machinery in motion, he cannot now avoid the natural and legal consequences of his own action. This Court has yet to sanction a principle of "selective obligation" by employees under union negotiated agreements, a result inconsistent with the principles of the National Labor Relations Act.[19]

V. CONCLUSION

For the reasons stated above the *amicus* urges the Court to affirm the decision of the Court below.

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[19] Cf. *J. I. Case Co.* v. *Labor Board*, 321 U.S. 332, 14 LRRM 501 (1944).

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1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-5847

HARRELL ALEXANDER, SR.,
Petitioner,

vs.

GARDNER-DENVER COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE AMERICAN RETAIL FEDERATION and BRIEF AMICUS CURIAE ON BEHALF OF THE AMERICAN RETAIL FEDERATION

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE AMERICAN RETAIL FEDERATION

The American Retail Federation respectfully moves for leave to file a brief *amicus curiae*.[1] In support of this motion, the Federation states:

1. The American Retail Federation is an organization composed of seventy-eight national and state retail associations. The membership of these associations consists of a wide variety of retail businesses ranging in size from small local stores to large national chains, representative of all aspects of the retail industry. Through these associations, the Federation represents approximate-

[1] Pursuant to Rule 42 of the Rules of this Court, the Federation requested consents from all parties to the filing of a brief *amicus curiae*. Counsel for Respondent declined to grant such consent.

ly eight hundred thousand retailers with close to six million employees.

2. The issue in this instant case—accommodation of arbitration as a cornerstone of our national labor policy with the need to provide an appropriate forum for claims of alleged employment discrimination—is a matter of significant national concern. Moreover, a substantial number of employers, who are in interstate commerce and subject to Title VII of the Civil Rights Act of 1964, have collective bargaining agreements containing both no-discrimination clauses and arbitration procedures to resolve disputes arising thereunder. The Federation is, therefore, vitally concerned that an appropriate balance be struck between the arbitral process and Title VII. The court below reached precisely that result, and its decision should, therefore, be affirmed.

For the foregoing reasons, the Federation respectfully requests leave to present its views.

Respectfully submitted,

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BRIEF OF THE AMERICAN RETAIL FEDERATION AS AMICUS CURIAE

This brief *amicus curiae* on behalf of the American Retail Federation is filed contingent upon the Court's granting the foregoing motion for leave to file a brief *amicus curiae.*

INTEREST OF THE AMICUS CURIAE

The interest of the Federation is set forth in its annexed motion for leave to file a brief *amicus curiae.*

SUMMARY OF ARGUMENT

Respondent, unless the decision below is affirmed, will be required to repeatedly defend against a single claim of unfair employment practice before both an arbitrator and a judge. This multiplicity of forums encourages litigation, rather than conciliation, contrary to the intent of Title VII. It also flies in the face of this Court's repeated recognition that arbitration awards, the preferred method of settling industrial disputes, must be final and binding on both parties. The policy advocated here by Petitioner—the employer is always bound by an arbitration award, but the employee is not if he loses—severely undermines the arbitration process. This Court, in adopting guidelines for federal courts to use in determining whether to defer in an employment discrimination case to an arbitration award which previously decided the *same* issue, must accommodate all of the competing interests involved.

ARGUMENT

I. IT IS CONTRARY TO THE PURPOSES OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT TO ENCOURAGE LITIGATION IN A MULTIPLICITY OF FORUMS.

The Civil Rights Act of 1964 places "great emphasis in Title VII on private settlement and the elimination of unfair practices without litigation." *Oatis* v. *Crown Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968) (emphasis added). *Accord: Culpepper* v. *Reynolds Metals Co.*, 421 F.2d 888, 891 (5th Cir. 1970); *Jenkins* v. *United Gas Corp.*, 400 F.2d 28, 32 (5th Cir. 1969). Yet, despite the Congressional policy, continual litigation is actually encouraged by the multiplicity of forums now available to a charging party. The instant case is illustrative.

Prior to instituting the present suit, Petitioner filed a complaint with the Colorado Civil Rights Commission; then he lodged an identical action with the Equal Employment Opportunity Commission; and finally he filed the same grievance under his collective bargaining agreement. Each forum found Petitioner's allegations meritless. Nevertheless, Petitioner now argues that he is entitled to this very panoply of possible remedies. Title VII, it is submitted, contemplates no such multiplicity of forums.

Even John De J. Pemberton, Jr., Deputy General Counsel of the Equal Employment Opportunity Commission, has referred to the prevailing duplicity of forums as a "defendant's nightmare." [1] And, as Mr. Pemberton further observed, the problem is exacerbated by the lack of finality accorded any of the decisions which may be adverse to a claimant. It is not surprising, therefore, that there has been a steady retreat from the early *Hutchings* [2] position of permitting unfettered recourse to federal courts to present discrimination claims anew, despite prior unsuccessful prosecution of those same claims in other tribunals. Thus, the *Hutchings* court itself later implicitly repudiated its earlier position and held that, under certain circumstances, an adverse arbitration award precludes further resort to federal court. *Rios* v. *Reynolds Metals Co.*, 467 F.2d 54 (5th Cir. 1972). Similarly, other decisions, in addition to that of the Tenth Circuit in this case, have refused to allow repeated litigation to go unchecked. *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd. by an*

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[1] Address of John De J. Pemberton, Jr., Deputy General Counsel, Equal Employment Opportunity Commission, before the American Bar Assn., Section on Labor Relations Law, August 15, 1972, as reported in Daily Labor Report, August 16, 1972, p. E-3 (B.N.A., Washington, D.C.).

[2] *Hutchings* v. *United States Industries*, 428 F.2d 303 (5th Cir. 1968).